

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:9/8/2004

Coram

The Honourable Mr. Justice T.V. MASILAMANI

Second Appeal No.1114 of 1993

Chikkan .. Appellant

-vs-

- 1.A.R.Perumal
2. Ramalingam
3. Neelavannan Respondents

Second Appeal against the judgment and decree dated 31.3.1992 made in A.S. No.55 of 1990 on the file of the Subordinate Judge, Gobichettipalayam reversing the judgment and decree dated 16.9.1989 in O.S.No.4 01 of 1981 on the file of the District Munsif, Gobichettipalayam.

!For Appellant : Mr.M.Doraisamy

^For Respondent-1 : Mr.R.T.Doraisamy
For R2 & R3 : N.A.

:JUDGMENT

The second plaintiff who failed before the first appellate Court is the appellant.

2. The second plaintiff is the son-in-law and the plaintiffs 3 to 5 are the legal representatives of the deceased first plaintiff. Originally, the plaintiffs 1 and 2 filed the suit for specific performance of the suit agreement for sale dated 29.6.1977 executed by the defendants 1 to 3/respondents 1 to 3 herein in respect of the suit property for a sum of Rs.8,000/-. The respondents/defendants resisted the suit on the ground that the said agreement is not true and valid and that the same had been forged to lay an unlawful claim by the plaintiffs. In the above circumstances, the trial Court having framed 7 issues, held on the basis of the evidence both oral and documentary adduced on either side that the suit agreement is true and valid and that therefore, the plaintiffs are entitled to the relief as prayed for.

3. As against the judgment and decree passed by the trial Court, the first defendant preferred the appeal before the Subordinate Court, Gobichettipalayam. The learned Subordinate Judge having analysed the evidence

on record and upon hearing the arguments advanced on either side rendered a finding that the suit agreement is not true and valid and that therefore, the plaintiffs are not entitled to any relief as prayed for. Hence, the appeal was allowed and the suit was dismissed with costs.

4. In the above circumstances, the appellant/second plaintiff filed this Second Appeal questioning the legality of the judgment and decree rendered by the first appellate Court. The Substantial question of law that arises for consideration in this Second Appeal is as follows:-

Whether an agreement of sale may be proved as if it was unattested in view of the provisions of Sections 68 and 72 of the Indian Evidence Act?

5. The contentions of the appellant/second plaintiff in the plaint may be stated briefly hereunder. The suit property belonged to the first defendant and therefore the first defendant along with defendants 2 and 3 entered into an agreement for sale dated 29.6.1977 to sell the suit property to the plaintiffs for Rs.8,000/-. The first defendant executed the same both for himself and on behalf of the minor defendants 2 and 3 and received Rs.1,500/- as advance on the date of the execution and agreed to execute the sale deed in favour of the plaintiffs before the month of 'Thai' (January), 1978 after receiving the balance sale consideration. Later, the first defendant received another sum of Rs.4,500/- from the plaintiffs and acknowledged the same in the agreement itself on 21.9.1977 in his own handwriting. When the plaintiffs called upon the first defendant to execute the sale deed after obtaining stamp papers, the first defendant did not comply with such request to appear before the Sub Registrar on 23.1.1978 and thereupon the plaintiffs were constrained to issue a registered notice which had been returned by the first defendant with ulterior motive. The plaintiffs are ready and willing to get the sale deed executed by the first defendant after paying the balance of sale consideration.

6. The first defendant/first respondent filed the written statement with the following contentions. The suit agreement is a forged document and there was no necessity for the defendants to sell the suit property nor had he executed the agreement after receiving Rs.1,500/- as advance. Similarly, the first defendant had not received any amount on 21.9.1977 and acknowledged the same in writing as alleged. In fact, there was a suit pending between the first defendant and his brothers and sisters in respect of the suit property and knowing fully well about such suit, the plaintiffs have created the suit agreement to make an unlawful gain. The suit property is worth Rs.4,000/- per acre and therefore it is false to contend that the defendants agreed to sell the entire extent for a sum of Rs.8,000/-. Since the notice alleged to have been issued by the plaintiffs was not received by the defendants, he had not issued any reply. The suit is barred by limitation.

7. The defendants 2 and 3 herein attained majority pending trial of the suit and therefore they filed a separate written statement containing similar averments as in the statement filed by the first defendant. They have also stated that since the suit agreement even if true is not binding on them as there was no necessity for selling the share of the then minor defendants 2

and 3 in the suit property.

8. The parties are referred to in this judgment as they were arrayed before the trial Court.

9. The second plaintiff is the appellant and the defendants 1 to 3 are the respondents herein. The suit was originally filed by the first and second plaintiffs and after the death of the first plaintiff, the plaintiffs 3 to 5 were impleaded as his legal representatives. Admittedly, the other plaintiffs have not joined with the second plaintiff in preferring this appeal.

10. The learned counsel for the appellant/second plaintiff has argued at the outset that the lower appellate Court was not correct in rejecting the evidence of P.W.2, the scribe of Ex.A-1, agreement of sale who speaks about the first defendant having received the advance money, affixed his signature in Ex.A-1. Therefore he has submitted that the evidence of P.W.2 has proved the execution of the agreement, even though he was not an attesting witness.

11. Per contra, the learned counsel for the defendants has argued and in my opinion rightly that the evidence of P.W.2, the scribe cannot be equated to that of the attester for the simple reason that Ex.A-1 does not contain any recital that the scribe had also signed therein both in the capacity as scribe and attester. Moreover, the evidence of P.W.2 would also disclose that he was not aware as to when P.W.3 attester signed in Ex.A-1 as an attesting witness and he would admit in the cross examination that the signature was obtained from P.W.3 fifteen days after the execution of the document. Moreover, his evidence on the whole would disclose that he is not a professional scribe as

he would admit in the cross-examination that he is working as a Fitter in a workshop at Coimbatore on the date execution of Ex.A-1 and that he married the grand daughter of the second plaintiff.

12. It is well settled by preponderance of decisions that attestation of a document as defined under Section 3 of the Transfer of Property Act should have been made with the intention to attest and that if a person puts his signature as a scribe he is not an attesting witness. Such proposition of law has been reiterated by the Supreme Court in ABDUL JABBAR v. VENKATA SASTRI (AIR 1969 S.C. 1147) wherein Their Lordships have held in paragraph 8 as follows:-

"Section 3 of the Transfer of Property Act gives the definition of the word 'attested' and is in these words:-

'Attested', in relation to an instrument, means and shall be deemed to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of

whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary. It is to be noticed that the word 'attested', the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact.

Briefly put, the essential conditions of a valid attestation under Section 3 are (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgement of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."

13. Hence, in view of the above ratio and the evidence of P.W.2, this Court is of the considered opinion that Ex.A-1 cannot be said to have been attested by P.W.2 and it follows that his evidence does not help in any way to prove the execution of the document.

14. The next contention put forth on the side of the plaintiffs is that the evidence of P.W.3 who had attested in the agreement for sale had not been considered by the lower appellate Court in coming to the right conclusion and therefore he has contended that the probative value of the testimony of P.W.3 cannot be brushed aside. On the contrary, the learned counsel for the defendants has pointed out at the outset that the evidence of P.W.3 is riddled with as many improbabilities as possible so as to ignore his testimony in this respect. It is admitted by P.W.3 himself that he did not sign in Ex.A-1 on the date of its execution, but 20 or 25 days later, when the plaintiffs 1 and 2 and the first defendant came to him, he signed in Ex.A-1. But, on the other hand, the first defendant has denied categorically the contention of P.W.3 that he accompanied the first and second plaintiffs, 20 or 25 days after the date of execution of Ex.A-1 and requested P. W.3 to affix his signature as attester to that document. Hence, the learned counsel for the defendants has rightly contended that in view of the specific denial by D.W.1, the first defendant, it is incumbent upon the plaintiffs to prove not only the signature of P.W.3 obtained 20 or 25 days later as per his evidence, but also the execution of Ex.A-1 by D.W.1.

15. Eschewing the evidence of P.W.3 in the light of the denial of execution of Exs.A-1 and A-2 by D.W.1, there is no acceptable evidence on record to prove that Exs.A-1 and A-2 were executed by D.W.1. In this context it has become necessary to consider whether the lower appellate court had followed the provisions under Sections 68 and 72 of the Indian Evidence Act. It is useful to refer the decisions rendered by the Apex Court in *FAKHRUDDIN v. STATE OF MADHYA PRADESH* (AIR 1 967 S.C. 1326) and *STATE (DELHI ADMN.) v. PALI RAM* (AIR 1979 S.C. 14) to emphasis the importance of the provision under Section 73 empowering the court to direct the party, whose signature or handwriting is in dispute, to give his specimen handwriting and signature so as to compare the same with the help of a handwriting expert.

16. It was held in AIR 1967 S.C. 1326 in paragraph 10 as follows:-

"Evidence of the identity of handwriting receives treatment in three sections of the Indian Evidence Act. There are Sections 45, 47 and 73. Handwriting may be proved on admission of the writer, by the evidence of some witness in whose presence he wrote. This is direct evidence and if it is available the evidence of any other kind is rendered unnecessary. The Evidence Act also makes relevant the opinion of a handwriting expert (S. 45) or of one who is familiar with the writing of a person who is said to have written a particular writing. Thus besides direct evidence which is of course the best method of proof, the law makes relevant two other modes. A writing may be proved to be in the handwriting of a particular individual by the evidence of a person familiar with the handwriting of that individual or by the testimony of an expert competent to the comparison of handwritings on a scientific basis. A third method (S. 73) is comparison by the Court with a writing made in the presence of the Court or admitted or proved to be the writing of the person."

17. Similarly, in AIR 1979 S.C. 14 in paragraph 29, it was held as follows:-

"The matter can be viewed from another angle also. Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against the person accused of an offence, solely on comparison made by himself. It is therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert."

18. In the light of the ratio laid down in the said decisions, if the facts of this case are analysed, it would be seen that neither the trial court nor the first appellate court directed D.W.1, the first defendant to give his specimen handwriting in order to enable a handwriting expert to compare the same with the handwriting found in Ex.A-2. Therefore, it follows that the first appellate court has to be directed to obtain the specimen handwriting from D.W.1 so as to enable a handwriting expert to compare the same with the disputed handwriting in Ex.A-2. Similarly, it is not out of place to mention that the handwriting expert may also be directed to compare the disputed signatures in Exs.A-1 and A-2 with that of the admitted signatures of the first defendant after getting such specimen signatures in the court itself. The expert may also be directed to compare the other admitted signatures found in the postal acknowledgement, deposition of D.W.1, etc., as the same are already available on record. In view of the above reasons, this Court is of the view that the matter has to be remitted back to the first appellate Court for carrying out the said direction and to dispose of the appeal after getting the expert opinion and upon hearing both sides on the basis of such opinion of the expert.

19. According to the evidence of P.W.2, Ex.A-2 was written by D.W.1 in his own hand and thereafter he affixed his signature not only as an executant, but also as scribe of the same. Ex.A-2 contains the recital that

D.W.1, the first defendant affixed his signature as the executant and also as the scribe of the same. The lower appellate court compared the disputed signatures and the admitted signatures of D. W.1 with reference to both Exs.A-1 and A-2. After analysing the evidence adduced on the side of the plaintiff, the learned Subordinate Judge came to the conclusion that in view of the improbabilities as seen from the testimony of P.Ws.3 and 4 and the contradictions between their versions as to the execution of Ex.A-2 by D.W.1, the said document could not have been executed by the first defendant.

20. Hence, the lower appellate court is directed to retain the appeal in order to carry out the following directions. Firstly, after obtaining the specimen handwriting and signatures from D.W.1, the same should be sent to the Government Handwriting Expert along with the disputed signatures and the handwriting in Exs.A-1 and A-2 for comparison and report which has to be marked as court exhibit thereafter the counsel appearing for both the parties may be given opportunity to argue with reference to the expert's report and then the lower appellate court is directed to dispose of the appeal in accordance with law.

21. Thus, the appeal is allowed setting aside the judgment and decree passed by the Subordinate Judge, Gobichettipalayam. The matter is remitted back to the first appellate Court for disposal in accordance with law in the light of the above observations within three months from the date of receipt of records. The Registry is directed to despatch the records to the first appellate court immediately. However, there will be no order as to costs.

Index: Yes

Website: Yes

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To

1. The Subordinate Judge, Gobichettipalayam.
2. The District Munsif, Gobichettipalayam.
3. The Section Officer, V.R.Section, High Court, Madras.

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